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IN THE

Supreme Court of the United States

October Term, 1952
No. 517

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,
Petitioners,

vs.

LEOLA JACKSON,
Respondent.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

Jurisdictional Statement.

This case is here on certiorari to the District Court of Appeal, Second Appellate District, State of California. Jurisdiction of this Court was invoked under 28 U. S. C. A. 1257(3) and Rule 38, 5(a) of this Court.

The Issue Involved.

This is another attempt to induce this court to hold that the Constitution sanctions exertion of state power to enforce racial residential segregation. Ordinances designed to accomplish that end—sometimes through attempts to restrict ownership of urban land[1] on the basis

[1] *Buchanan v. Warley*, 245 U. S. 60. The Louisville, Kentucky, ordinance drawn in question there interdicted Negro occupancy in certain sections of the city and, conversely, forbade white occupancy in others. The effect was to limit ownership

of race, and at others to limit occupancy rights of Negroes at the whim of neighbors—were held unconstitutional thirty-five years ago. Five years ago state courts were denied the right to use their process to restrain ownership or occupancy of real property by Negroes.[3]

The variant here is that the objective of residential segregation is sought to be achieved through a levy of damages against the signer of a race restrictive covenant whose property is ultimately occupied by a Negro after the agreement was signed and *after* sale by the signer. Petitioners carefully avoid any mention here of their segregatory purpose but the agreement they signed is eloquent of their intentions.[3a] They were not so reticent in briefs filed in the state courts. There they complained that they:

> ". . . are obliged to anticipate the influx into their neighborhood of genuinely unwholesome factors."

They foresaw all manner of evil if their claim for damages were denied. A decision adverse to them, they said, would lead:

> ". . . . first, to use and occupancy of other real property by non-Caucasians, and second, to the reprehensible tactics of unscrupulous real estate dealers who canvass a neighborhood afflicted by the breach of promise against use and occupancy and harass

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[2] *Harmon v. Tyler*, 273 U. S. 668. A New Orleans ordinance forbade Negro occupancy in "white" blocks and white occupancy in "Negro" blocks without the consent of the majority of residents. See, also: *Richmond v. Dean*, 281 U. S. 704.

[3] *Shelley v. Kraemer*, 334 U. S. 1; *Hurd v. Hodge*, 334 U. S. 24. As we shall show later the race restrictive covenants drawn in question in those cases were similar in form and identical in aim with the agreement that bottoms this action.

[3a] The agreement proscribed occupancy by all but persons "wholly of the white or Caucasian race" [R. p. 3].

and intimidate and alarm the residents in an intensive drive for listings, and third, to the appearance upon the streets of the afflicted neighborhood of an unusual number of strangers of a demeanor and countenance such as to cause concern for the safety of the wives and daughters of the residents, and, fourth, to the anxiety of parents that their children will grow up to marry, or worse, with a neighbor playmate of a different race. These four unwholesome factors and others do not consist in any part of sale to non-Caucasians and all are traceable only to use and occupancy by non-Caucasians."

Seldom has the case for racial residential segregation been put in more direct, or more emotional, terms. The purpose of a contract like "The purpose of a rule of law must be found in its natural operation and effect."[4]

Statement of Facts.

There are three Petitioners here.

All of them are home owners in a Los Angeles residential tract.

Two of them—Barrows and O'Gara—and Respondent, who was then a home owner in the tract, signed a race restrictive agreement on October 21, 1944.

One of them—Pikaar—was *not* a signer of the agreement, but is a successor in interest of another signer.

The agreement was properly recorded[5] on May 5, 1945.

Respondent sold her home on February 2, 1950, but did not include the proscriptive racial clause in her deed as she had promised in the 1944 agreement.

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[4]Holmes, J., dissenting in *Bailey v. Alabama*, 219 U. S. 219.

[5]Such agreements may be recorded in California. *Wayt v. Patee*, 205 Cal. 46.

Respondent vacated her home on September 3, 1950. *After* she had moved out, and seven months *after* she had sold the home the non-conforming occupancy began.

Petitioners make no claim here that Respondent was the efficient cause of that non-conforming occupancy.[5a] They construe the 1944 document as an agreement in the nature of an insurance contract and rest their charge of breach on the fact that Negro occupancy occurred *after* the signing of the agreement.

The agreement is not pleaded *in haec verba*, nor is it attached to the complaint but Petitioners plead that:

> "by the terms of said Agreement each of the signers promised and agreed in writing and bound himself, his heirs, executors, administrators and assigns by a continuing covenant that no part of his said real property should ever at any time be used or occupied by any person not wholly of the white or Caucasian race, and also agreed and promised in writing that this restriction should be incorporated in all papers and transfers of lots. . . . That said Agreement was agreed to be a covenant running with the land. That each provision was for the benefit for all the lots therein described" [R. p. 3].

Petitioners' claim for damages is predicated on two grounds:

1. Respondent's failure to incorporate the proscriptive racial clause in her deed of February 2, 1950.

2. The occurrence, *per se*, of Negro occupancy *after* Respondent had signed the 1944 agreement.

[5a] That claim is asserted in the complaint but has been abandoned for reasons that will be pointed out later.

Questions Presented.

Although Petitioners' arguments are diffuse and difficult to isolate it is fairly apparent that their claims of error in the court below rest on the following propositions:

1. The claim that the refusal of the state courts to entertain the suit and the consequent failure to enforce the agreement through a levy of damages against Respondent impaired the obligation of a contract—the contract referred to being the 1944 agreement.

2. The claim that the California court erred in permitting Respondent to assert by way of defense that since a levy of damages would eventuate in exertion of state power to enforce racial residential segregation, in contravention of the command of the Fourteenth Amendment, state courts could not enforce the claim for damages for an alleged breach of a race restrictive agreement.

3. The claim that Petitioners were denied due process of law through the refusal of the California courts to enforce their claim for damages for an alleged breach of the 1944 agreement.

4. The claim that Petitioners were denied equal protection of the law because they were denied the right, accorded other persons, of enforcement by securing damages for breach of a "contract."

We consider these claims in that order.[5b]

[5b] We also assert another ground which, we believe, will sustain Respondent's position. That claim is urged in Point 5.

Summary of Argument.

1. The action of the state court in refusing to enforce a claim for damages against the signer of a 1944 race restrictive agreement, where Negro occupancy eventuated after her sale of the restricted property, does not impair the obligation of a contract in violation of Article I, Section 10, of the Constitution. California has not changed its law in respect of such agreements, as it existed in 1944, except to the extent that it has assimilated the rule in *Shelley v. Kraemer*, 334 U. S. 1, and no longer tolerates judicial enforcement of race restrictive agreements.

2. The state court was correct in holding that the action of Petitioners seeks to nullify the decision of this court in *Shelley v. Kraemer, supra,* in that they seek to use state judicial machinery to enforce an agreement which would exclude non-Caucasians from occupying real property. In the *Shelley* case the signers of the agreement sought injunctive relief and in this case, damages, but in both cases the end-purpose is to use the enforcement powers of the state to deprive non-Caucasians of their right to occupy real property. Under those circumstances the state court was powerless to aid Petitioners.

3. Petitioners were not denied due process of law through being denied access to the state courts to enforce their claim for damages. The Fourteenth Amendment deprives them of the use of the courts when their purpose is the enforcement of a discriminatory agreement.

4. Petitioners were not denied equal protection of the law in being denied access to the courts to enforce race restrictive agreements since the Constitution confers on no individual the right to demand action that will result in denial of equal protection of the law to other individuals (*Shelley v. Kraemer, supra*) and it is plain the power of the state to make and enforce property rights must be exercised within the boundaries of the Fourteenth Amendment (*Marsh v. Alabama,* 326 U. S. 501).

5. Enforcement of the claim for damages against Respondent signer of a race restrictive agreement where non-conforming occupancy eventuated after her sale of the property would deny Respondent due process of law (*Buchanan v. Warley,* 245 U. S. 60).

6. Failure of Respondent to include the terms of proscriptive racial agreement in her deed of sale, given seven months before non-conforming occupancy began, gave rise to no cause of action since the recorded restrictive agreement gave notice to all future purchasers (Cal. Civ. Code, Sec. 1213; *Wayt v. Patee,* 205 Cal. 46). In any event the failure is *de minimis.*

7. This case is governed by the Fourteenth Amendment and there is no need here to invoke considerations of public policy or the consequences flowing from our adherence to the Charter of the United Nations.

ARGUMENT.

1. The Impairment of Contract Claim.

Petitioners do not claim, as indeed they cannot, that any legislative enactment is involved here. California does not have, and never has had, a statute defining the rights, duties and obligations that accrue to signers of agreements restricting land use or occupancy on the basis of race. California does have a substantial body of substantive law bearing on those issues. That law was developed between 1919 and the decision in *Shelley v. Kraemer*, 334 U. S. 1, in 1948. A goodly portion of it was analogized from the contemporary and ever developing law respecting building restrictions.

The following rules of substantive law encompass the field:

1. Agreements restraining *sale* of land to members of defined racial groups were *unenforcible* because they contravened the state's statutory rule and public policy against restraints on alienation.

Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152;

Wayt v. Patee, 205 Cal. 46.

2. Agreements restraining *use and occupancy* of land by members of defined racial groups were *enforcible* and it made no difference whether the restraint on use and occupancy was imposed by deed or through neighborhood agreement.

L. A. Investment Co. v. Gary, 181 Cal. 681;

Wayt v. Patee, supra.

3. Agreements restraining use and occupancy were entitled to recordation under the state's recording statute and when so recorded imparted constructive notice to all future purchasers.

Wayt v. Patee, supra.

The doctrine of enforcibility of restraints on use and occupancy rested on the following propositions:

(a) The signing of an agreement by lot owners, or the imposition of a condition in a deed, forbidding use and occupancy by members of a defined racial group imposed an equitable servitude on the then owned lots.[6]

Werner v. Graham, 181 Cal. 874;

Martin v. Holm, 197 Cal. 773;

Wayt v. Patee, 205 Cal. 46;

Fairchild v. Raines, 24 Cal. 2d 818.

(b) The courts would charge the conscience of the signer, or his subsequent grantee, with observance of the agreement where such person had notice, actual or constructive, of the terms of the agreement and would enforce the agreement either by the command of specific performance or through a levy of dam-

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[6]In developing this rule of substantive law as to equitable servitudes, California followed the general trend of the law in this field. (See: 4 Pomeroy Equity Jurisprudence (Fifth Ed.) 845 *et seq.*; 33 Harvard Law Review 813; 10 So. Cal. Law Review 281; 16 Mich. Law Review 90.) In respect of the character of the burden imposed the law was the same in race restrictions as in building restrictions in California.

ages and it made no difference whether the covenant did, or did not, run with the land.

L. A. Investment Co. v. Gary, 181 Cal. 681;
Littlejohn v. Henderson, 111 Cal. App. 115;
Alderson v. Cutting, 163 Cal. 503;
Burkhardt v. Lofton, 63 Cal. App. 2d 230.

(c) The right to enforcement, either to compel observance or force a response in damage accrued to lot owners—both original signers and their successors in interest as against subsequent violators,[6a]

Littlejohn v. Henderson, supra;
Wayt v. Patee, supra.

(d) Even where a valid restraint on use and occupancy subsisted the courts might refuse enforcement upon considerations of public policy or because of changes in or surrounding the bound lots.

Letteau v. Ellis, 122 Cal. App. 584;
Fairchild v. Raines, 24 Cal. App. 2d 818;
Friesen v. Glendale, 209 Cal. 524.

(e) No cause of action arose as against a seller of race restricted property for *sale* of that property to a member of the proscribed class.

Stratton v. Cornelius, 99 Cal. App. 8.

This was the law as enforced by the California courts in 1944 when the agreement in question was drafted and

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[6a] Petitioner Pikaar, a nonsigner and a successor in interest of a signer, seeks to avail himself of this rule of law. Otherwise he is an improper party.

signed by Petitioners and Respondent. It continued to be the law of the state until this court decided the *Shelley* case in 1948. Thereafter the California courts assimilated the ruling in the *Shelley* case to state law and consequently declined to use their process to enforce race restrictive covenants through application of law that had theretofore been considered applicable.

Cummings v. Hokr, 31 Cal. 2d 844.

Petitioners pleaded in their complaint that Respondent "moved out of the house . . . in order to permit" non-Caucasian occupancy and that "in violation of said Agreement, has permitted persons not wholly of the white or Caucasian race to occupy" her lot [R. p. 4]. These averments would have been adequate prior to the *Shelley* case to have stated a cause of action against her. She could have been compelled to specifically perform by ousting her permitees or to have responded in damages, under the California cases just cited.[6b] The court below held that prior to the *Shelley* case a cause of action for damages as against Respondent would have been stated, not for the

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[6b]Petitioners admit in their brief (p. 28) that in any action against her for sale of the property "respondent could make the non-federal defense that her promise was void in California as a restraint on alienation." It is also apparent that since the occupancy complained of took place after sale and after Respondent had parted with power to control occupancy she could not "permit" non-Caucasian occupancy. No cause of action arose in California by reason of sale to non-Caucasians who might be expected to occupy the home they had purchased. (*Stratton v. Cornelius,* 99 Cal. App. 8.) Thus, on closer examination, Petitioners have been forced to abandon the averment of "permitting" and are thrown back on the theory that the agreement is in the nature of a contract of insurance. They now claim that occurrence of occupancy, *per se,* imports liability. This is not an action for breach attendant on the sale but for a breach flowing from occupancy of the premises by non-Caucasians after the completed sale.

sale but because of her alleged "permitting" the Negro occupancy.

However, Petitioners' contention that California courts have impaired the obligation of a contract is untenable. The insuperable barrier to enforcement in this case is not the whim or caprice of the California courts but the holding of this Court in the *Shelley* case. Parenthetically, we do not know of any constitutional impediment to a change of decisions by state courts where, as here, no statute is drawn into question or construed. Had the state court held that enforcement of race restrictive covenants worked a restraint on alienation or was contrary to state public policy, in direct contradiction to prior rulings, no impairment of the obligation of a contract in a constitutional sense would have resulted.

Cf:

Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50;

Sauer v. New York, 206 U. S. 536.

In any event, the court below laid aside all questions of state law and posited its decision squarely on the *Shelley* case. There this court held that:

> "We conclude, therefore that the restrictive standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment."
>
> *Shelley v. Kraemer, supra,* p. 13.

That had been the law of California prior to the *Shelley* case and the court below did not disturb that concept or change, or alter, it in any respect. That is still the law of California.

In rejecting arguments made in the *Shelley* case that race restrictive agreements were void this Court held that:

> "So long as the purposes of these agreements are effectuated by voluntary adherence to their terms it would appear that there has been no action by the State and the provisions of the Amendment have not been violated."
>
> *Shelley v. Kraemer, supra,* p. 13.

The court below did not narrow that right of voluntary adherence to the terms of this or any other race restrictive agreement in any particular. Petitioners are as free as they ever were to enter into, and observe, or *voluntarily adhere* to the terms of any race restrictive agreement they can devise.

In summary, the California court, looking through form and at substance, came to the conclusion that the end sought in this action was *enforcement* of race restrictive agreements. It was clear to that court that:

> "Racial discrimination is inherent in the covenant; its purpose and impact is to prevent use or occupancy of real property by non-Caucasians, to segregate non-Caucasians 'simply that and nothing more.' The basic pattern of racial discrimination is much the same in an action for damages as it is in a suit in equity" [R. p. 53].

Having decided that question to its own satisfaction it simply declined to exert its power, which is state power, to effectuate the end. Its declination to do in 1952 what it might have done in 1944, was not due to any notion of its own as to state law but in response to the decision of this court in the *Shelley* case in correcting the erroneous concept of state action which the California courts had

entertained since 1919. There is no impairment of the obligation of a contract in such a situation.

The short of the matter is that Petitioners drafted and signed the 1944 agreement[6c] in what proved to be the vain belief that constitutional interpretation of their enforcement rights would remain static. The enforcement of what they choose to call the "contract" has been foreclosed, not by the California courts, but by the command of the Fourteenth Amendment.

2. The Effect of Enforcement.

Petitioners next argue that even if it is true that the end envisaged by the court below to the effect that an award of damages would eventuate in enforcement of the race restrictive agreement and would thus effectively deny members of the proscribed group "equality in enjoyment of property rights" and "prevent use and occupancy of real property by non-Caucasians . . . segregate non-Caucasians," through exertion of state power, Respondent cannot avail herself of those facts as a defense in this action for damages. This is only another way of saying that although this agreement cannot be enforced by state courts by a decree in specific performance it can be enforced by the same courts in a damage action.[7]

[6c] Again we wish to point out that Petitioner Pikaar was not a signer of the 1944 agreement. As to him and Respondent there was no privity. His presence here as a complainant underscores the proposition that enforcement rights under these agreements accrued through operation of substantive rules of law devised to effectuate the ends sought by covenantors and do not rest on ordinary rules governing contractual duties as such.

[7] Of course an award of damages for breach of a contract is only a method of enforcing a contract. (See: Restatement, Vol. I, Secs. 13, 14, 178, 225, 327; Vol. II, Secs. 598, 609. See also, *Oakland Car Co. v. Indiana Motors*, 201 Fed. 499.)

Petitioners' citation of authorities holding that constitutional guarantees accrue to the advantage of individuals before the court are correct, but not relevant here. They mistake the rationale of the decision of the California court. As we have pointed out the court below found that "racial discrimination is inherent in the covenant; its purpose and impact is to prevent use or occupancy of real property by non-Caucasians, to segregate non-Caucasians . . . the basic pattern of racial discrimination is much the same in an action for damages as it is in a suit in equity" [R. p. 53].

Having arrived at that very obvious and, it seems to us, incontrovertible conclusion the court below was faced with the question of whether or not it could exert its power—the power of the state—to enforce the "racial discrimination inherent in the covenant" [R. p. 53]. Its position at that posture of the case was the same as that of any court called upon to enforce an agreement contrary to good morals, or public policy, or contrary to express statutory or constitutional command.[7a] California courts have always declined to act under such circumstances, leaving the parties where they found them.

Takeuchi v. Schmuck, 206 Cal. 782, 276 Pac. 345;
Endicott v. Rosenthal, 216 Cal. 721, 16 P. 2d 673.

Cf.:

Sage v. Hume, 235 U. S. 99.

[7a] The Fourteenth Amendment is an express command in these circumstances.

"The majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination."

Fay v. New York, 332 U. S. 261, 282.

The purpose of the courts in refusing to act in such circumstances is not to punish the individuals before them but to uphold the policy of the law.

Orlinoff v. Campbell, 91 Cal. App. 2d 382, 205 P. 2d 67.

Cf.:

Continental Paper Co. v. St. Louis Vaight, 212 U. S. 227.

California courts, trial or appellate, assert the power to decline intervention to enforce such contracts on their own motion and without regard to the pleadings of the parties, under those circumstances.

Fewell v. Pratt, 17 Cal. 2d 85.

The command against exertion of state power to enforce racial residential segregation—the end found inherent in any award of damages by the court below—flows from a higher source than the state constitution or laws, or California's public policy. It comes from the Constitution itself, as demonstrated by this court in the *Shelley* case. Plainly, the court below was compelled to measure its powers and duties by the terms of that decision. Its discussion of the consequences that would have flowed from enforcement of the agreement drawn in question here and its repeated emphasis on the civil rights of non-Caucasians were not advanced by the court below to justify the decision on the ground that constitutional rights of non-parties to the litigation, *as such,* would be affected but rather to demonstrate the reasons *why* it was compelled to leave the parties where it found them. It also considered the application of the *Civil Rights Cases,* 109 U. S. 3, with their recurrent reiteration of the

proposition that the Fourteenth Amendment "makes void state action of every kind" indulged in to aid individual invasions of civil rights. Out of these considerations the court below held correctly that:

> "The Fourteenth Amendment does not proscribe individual action; but when, as here, the aid of a court is sought to compel one of the parties to the restrictive covenant to abide by its terms by subjecting him to an action for damages because of use or occupancy of the property by non-caucasians—it is no longer a matter of individual action; it is one of state participation in the maintenance of racial residential segregation." [R. p. 53.]

Petitioners' only answer to this conclusion is to repeat endlessly that they were signatories, with Respondent, to a "contract" and that the *Shelley* case held such "contracts" to be "valid." These assertions are only semantic exercises. This court did not talk about "contracts" in the *Shelley* case.[8] It talked about "agreements."

The very word "contract" imports enforcibility[9] and not every writing is a "contract" in that sense. When agreements of the kind drawn in question here are equated with the holding in the *Shelley* case—to the effect that they are unenforcible—they are not "contracts" in the technical sense. There are many agreements, not void as between the parties and susceptible of voluntary compliance, that will not be enforced by the courts, whether be-

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[8]The phrase "agreements" appears some 18 times in the court's discussion. The word "contract" is used only twice and then in a particular context.

[9]"A contract is a promise or set of promises for breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty." (Restatement of Law of Contracts, Vol. I, Sec. 1.)

cause of statutory interdiction or because of substantive rules of law. For example, California courts will not enforce an agreement outside the Statute of Frauds, or one barred by the Statute of Limitations, or where laches is shown. We have pointed out that agreements of the kind under consideration were denied enforcement by California courts, *even where valid,* because of change of conditions or for reasons of public policy. Validity alone was never the test of whether a restrictive agreement would be enforced.

Moreover, this court did *not* hold such agreements "valid," in the narrow technical sense, in the *Shelley* case.[10] It did not even use that word to describe them or their attributes. It said simply and with finality that "so long as the purposes of these agreements are effectuated by voluntary adherence to their terms it would appear that there has been no action by the State and the provisions of the Amendment have not been violated." It reiterated that view in *Hurd v. Hodge, supra,* saying of the applicable federal law, "the statute does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms."

The right of the parties to voluntary adherence is not questioned here. However, the concept of voluntary adherence is a far cry from that of the technical attributes Petitioners would read into the terms "valid" as used in the law of contracts.

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[10]The California District Court of Appeal did use the term "valid" but it is apparent from a reading of its decision that it did not use the term in any narrow technical sense. It meant only that the agreements were not void. The phrase used is "constitutionally" valid.

3. Petitioners' Claim of Denial of Due Process of Law.

Petitioners next move to their claim that they have been denied due process of law through refusal of the California courts to entertain their action for damages. Apparently that claim is posited on the contention that the liberty of contract has been effectively denied them because they have been denied their claim for enforcement of the 1944 agreement. We have no quarrel with the generalization that liberty of contract is one of the rights protected by the Constitution. It is equally well settled that:

> "There is no such thing as absolute freedom of contract . . . . the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons."
>
> *Atlantic Coast Line v. Riverside Mills,* 219 U. S. 186, 202.

"General propositions do not govern concrete cases"[10a] and the situation here is not illuminated by reiteration of the truism that enforcement is the ordinary consequence attendant on signing of agreements. What is involved here is a concrete kind of an agreement, out of which particular relationships arise. While "all rights tend to declare themselves absolute to their logical extreme"[11] the fact is that the "right" involved here is not absolute as shown by the ruling in the *Shelley* case. This court *did* foreclose enforcement of agreements of the kind under consideration here in that very case. It denied to signers

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[10a]Holmes, J., dissenting in *Lochner v. New York,* 178 U. S. 45.

[11]*Hudson Water Co. v. McCarter,* 209 U. S. 349, 355.

of race restrictive agreements the right to secure enforcement through specific performance and there, as here, there was vigorous argument that denial of the remedy would rob such agreements of vitality and effect. There is no more reason why the remedy of enforcement through damage actions should be preserved than there is for the preservation of the remedy of specific performance. Both are methods of enforcement. Both affront constitutional guarantees. Denial of the former no more denies due process than denial of the latter. As the court below phrased it:

> "The denial of access to the courts does not deprive plaintiffs (Petitioners) of their property without due process of law. The Constitution itself deprives them of the use of the courts when their purpose is in the enforcement of their discriminatory covenant." [R. p. 55.]

The right to enforcement does not accrue simply because parties have signed an agreement:

> "And more broadly it has long been recognized that contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent cannot be made the ground of successful suit."
>
> *Sage v. Hume,* 235 U. S. 99, 105.

The agreements they sign must be assessed in the light of the result they seek and when those results collide with constitutional commands the courts must decline enforcement.

4. Petitioners' Claimed Denial of Equal Protection of the Law.

Petitioners' claim that denial of access to the courts to enforce the terms of their agreement denies them equal protection of law is insubstantial. The short, and complete, answer is afforded by the *Shelley* case:

> "Nor do we find merit in the suggestion that persons who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property rights must be exercised within the boundaries defined by the Fourteenth Amendment.. Cf. Marsh v. Alabama, 326 U. S. 501."
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> *Shelley v. Kraemer, supra,* p. 22.

Here again the applicability of the language just quoted turns on the finding of the court below that the purpose of the agreements was discriminatory and that their enforcement through the levy of damages would result in exertion of State power to effectuate the discriminatory purpose. That being so, there is no more of denial of equal protection where access to the courts is denied in a suit for damages than there is in an action for specific performance.

5. Enforcement of the Agreement Would Deny Respondent Due Process of Law.

There is an additional ground, not relied upon by the court below but urged by Respondent at every stage of the proceeding, that bars Petitioners' claim for enforcement [R. pp. 8, 32].

There can be no doubt since the *Shelley* case that judicial action in enforcing substantive common law rules is state action as that term is used in a constitutional sense.

> "It has been recognized that the action of State courts in enforcing substantive common law rules formulated by those courts may result in denial of rights guaranteed by the Fourteenth Amendment."
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> *Shelley v. Kraemer, supra,* p. 17.

We do not understand Petitioners to contend that a statute, ordinance or other legislative enactment of a state, or one of its subdivisions, imposing a fine on the signer of a race restrictive agreement or prescribing damages, in the case where Negro occupancy eventuated after the signing of the agreement, would escape constitutional condemnation. Nor would the result depend upon whether the accused had, or had not, signed the agreement. It would be clear in such a situation that the State had exerted its power to enforce racial residential segregation through this attenuated device. The denial of due process would be apparent whether the fine, or the award of damages, took the entire proceeds of sale or only part of it.

A substantive rule of law is no less, and no more, subject to legislative scrutiny than a legislative enactment.

Shelley v. Kraemer, supra, p. 14;

American Federation of Labor v. Swing, 312 U. S. 321.

The fact that State participation is invoked to enforce the terms of a private agreement is not significant in this context.

> "Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purpose of the Fourteenth Amendment, refers to exertion of state power in all forms."
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> *Shelley v. Kraemer, supra,* p. 20.

The ultimate effect of enforcement is the same where breach of contract is claimed, whether that enforcement is secured through levy of damages in a civil action or by a fine in a criminal action.

> "Any legal liability for the breach of a contract is a disagreeable consequence which makes the contractor do as he said he would. Liability to an action for damages has that tendency as well as a fine."
>
> *Bailey v. Alabama,* 219 U. S. 219, 246 (Holmes, J., dissenting).

The proposition that exertion of State power to clog the sale of real property for racial considerations denies due process of law was originally decided by this Court in *Buchanan v. Warley,* 245 U. S. 60.

A Louisville ordinance prescribed racial residential segregation through the device of forbidding occupancy of certain real property by Negroes. Buchanan, a white person, agreed to sell a parcel of interdicted property to Warley, a Negro. Warley breached the contract and pleaded the ordinance by way of defense, on the ground that his agreement of purchase required consummation

only if he was free to occupy the parcel. He prevailed in the State Court (*Buchanan v. Warley,* 165 Ky. 559).

On writ of error to this Court, Buchanan attacked the constitutionality of the ordinance on the ground that it nullified his civil right to dispose of his property as he saw fit. There, as in the comparable situation here, the objection:

> ". . . is made that this writ of error should be dismissed because the alleged denial of constitutional rights involves the rights of colored persons and plaintiff in error is a white person."
>
> *Buchanan v. Warley, supra.*

This Court in the *Buchanan* case, as was the case with the court below, assessed the situation and saw readily enough that what was on the surface a mere breach of contract action was, in reality, an attempt to secure constitutional sanction for exertion of State power to enforce racial residential segregation. In the *Buchanan* case the command of the ordinance against Negro occupancy, and ownership of which occupancy is a mere incident, was absolute. Here the attempt to forestall Negro occupancy, as an incident of ownership, is sought to be achieved through a levy of damages against the owner whose sale eventuates in such occupancy but it is plain that the imposition of damages on the seller is designed to achieve the absolute of preventing the unwanted occupancy. The avowed end of the Louisville ordinance was to prevent occupancy of certain property by Negroes; the avowed end of the 1944 agreement in this case is to prevent occupancy of certain property by non-Caucasians. In the *Buchanan* case the ordinance was drawn into issue through an attempt to penalize the seller by annulling his

sale; in this case the 1944 agreement is drawn into issue through an attempt to penalize Respondent through a levy of damages that will annul the sale by taking away the monetary advantage that may have accrued.

This Court epitomized the issue in the *Buchanan* case with the holding that:

> "The right which this ordinance annulled was the civil right of a white man to *dispose* of his property if he saw fit to do so to a person of color." (Italics added.)
>
> *Buchanan v. Warley, supra*, p. 81.

This dispositive right as a civil right was reaffirmed and emphasized in the *Shelley* case:

> ". . . . among the civil rights intended to be protected from discriminatory State action by the Fourteenth Amendment are the rights to acquire, enjoy, own and *dispose* of property." (Italics added.)
>
> *Shelley v. Kraemer, supra*, p. 10.

What Petitioners seek here is enforcement of a rule of law which will annul the civil right of Respondent to dispose of her property as she sees fit.[12] There is here the same issue abstracted by this Court from the *Buchanan* case and the *Harmon* case:

> "The precise question before this Court in both the Buchanan and Harmon cases involved the right of

[12]Under Petitioner's theory that non-conforming occupancy, *per se*, attaches liability to the signer of a race restrictive agreement the limitation on her right to sell is severe. Such liability might attach long after her disposal of the property and whenever the non-conforming occupancy began. Plainly the precise purpose of the suit to enforce the contract through a damage action is to annul the right to dispose of her property as Respondent sees fit. That is what Petitioners want. That is why they are here.

white sellers to dispose of their properties free from restrictions as to potential purchasers based on considerations of race or color."

Shelley v. Kraemer, supra, p. 12.

That is the precise question here. In truth, the issues confronting the Court in the *Buchanan* case and those presented in this one are reverse sides of the same coin. In the former the State Court was enjoined by the ordinance to penalize the seller by nullifying his contract of sale; in this case the State Court is urged to penalize the seller by, in effect, nullifying his sale through taking the increment of the sale by way of a levy of damages. The aim is to impose "restrictions as to potential purchasers' nonracial considerations" in both instances. The command in the former case is statutory; in the latter the State Court is asked to reach the identical end through the self-discipline of a substantive rule of law.

It is at this posture of the case that Petitioners interpose the contention that Respondent as a signer of the 1944 agreement is bound by it and does not stand before the Court on the same terms as the "willing sellers" in the *Buchanan* case or the *Shelley* case. The vice of this argument is the tacit assumption that the civil right to "acquire, enjoy, own and dispose" without restrictions as to race or color of real property is a mere contract right or property right which the State may curtail or regulate. If that were so then the ordinance in the *Buchanan* case could have been justified" under the authority of the State in the exercise of police power."[13] But there this Court held with finality:

"It is urged that this proposed segregation will promote the public peace by preventing race conflicts.

[13] *Buchanan v. Warley, supra,* p. 81.

> Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."
>
> *Buchanan v. Warley, supra,* p. 81.

It is clear, then, that the command of the Fourteenth Amendment is addressed to the State and that the purport of that command is that the State cannot annul the civil right of free disposal of property, on considerations of race or color through the exercise of its police power. The *Shelley* case holds that the power thus denied to the State in the exercise of its police power cannot be conferred on it by inducing it to enforce a private agreement. On the one hand the State undoubtedly has an interest in enforcing private agreements; on the other the Amendment stays its hand where exertion of its power would annul this civil right. Thus *whenever* the Respondent assumed the status of a "willing seller," as she did in this case, the State could not use its process to abort the sale she proposed to make. The taking of her property, through an award of damages, would constitute a denial of due process of law as to her. To return to our earlier example, there would be no difference in a constitutional sense whether the State sought to abort such a sale through law or ordinance, imposing a fine or assessing damages against the signer of a race restrictive agreement for a sale which eventuates in Negro occupancy, or whether it reached the same end through application of a substantive rule of law making that signer liable in damages to other signers. Petitioners and Respondent were, and are, free to enter into the discriminatory agreement, and to observe it, but they cannot confer on the State Court jurisdiction to exert its power to enforce that

agreement. The Fourteenth Amendment forbids what they propose.[14]

Petitioners suggest finally that the sale to the non-Caucasian had been made in this case and that hence no levy of damages could assist their discriminatory intent to invoke exertion of state power to enforce racial residential segregation. That unsophisticated concept slurs reality. "Every opinion tends to become a law,"[15] Justice Holmes admonished us a long time ago. That admonition has greater significance in this case than it may have in other litigation. Judges and lawyers do not need to be told that the end-purpose of a suit of this kind—chosen, Petitioners said in briefs filed in the state courts, as a test case—is to create precedential substantive law that will have conse-

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[14]Implicit in Petitioner's argument on this phase of the matter is the theory made explicit in the brief of St. Louis *Amicus*, that private individuals have a constitutionally protected "right" to discriminate on the basis of race or color. St. Louis *Amicus* epitomizes that view on page 12 when reference is made to "private discrimination protected by the Civil Rights Cases . . ." The *Civil Rights Cases* did not impute that meaning to the Fourteenth Amendment. What they did hold is that the Fourteenth Amendment did not impose prohibitions on individuals, as such, and that the State cannot be said to "sanction" or "support" discriminatory acts of individuals merely because it does not make them unlawful. Once however the State forsakes that passive role and lends its sanction or support "by some shield of State law or State authority" its action stands condemned by the Amendment. So here, the State may not sanction or support Petitioners in their effort to induce exertion of its power and that, not because of, or in spite of, Petitioner's morality, or lack of it, in not observing the agreement, but because of the restraint imposed on the State. On the other hand the State is entirely free to curb, or to prohibit "private discrimination" precisely because such discrimination is not "protected."

Fay v. New York, 332 U. S. 261.

[15]Holmes, J., dissenting in *Lochner v. New York*, 178 U. S. 45.

quences far beyond the outcome of this case.[16] The State has neither the duty nor the power to take Respondent's property, under the guise of an award of damages, to create the pattern of segregation.

Cases involving issues of this kind call into full play the century old declaration of this court that it must ever be kept in mind that "it is a constitution we are expounding"[17] and of the admonition in the *Shelley* case that:

> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation af those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with that fundamental purpose in mind."
>
> *Shelley v. Kraemer, supra,* p. 23.

The claimed right of Petitioners for blind judicial enforcement of what they, by a process or rationalization call "contract rights," must yield to *constitutional* implementation of the fundamental purpose of the Amendment.

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[16]The filing of *amicus* briefs on behalf of widely scattered property owners' organizations, all interested in the preservation of racial residential segregation, would seem to indicate that these laymen do not regard this case as having a narrow compass.

[17]Marshall, C. J., in *Bank of U. S. v. Deveaux,* 5 Cranch 61.

6. Failure to Incorporate the Proscriptive Clause.

The court below believed that its view of the impropriety of granting Petitioners access to the courts to enforce their claim for damages obviated any necessity for considering the claim for damages against Respondent for her failure to include the proscriptive racial clause in her deed of February 1950. We agree but we would like to point out that her failure had no practical consequences. Petitioners plead that the agreement was recorded. Under California law recordation imparted constructive notice of its terms and subsequent purchasers were as tightly bound as if the clause had been inserted in the deed.[18] In any event the claim is a mere quibble under the rule of *de minimis*.

7. "Anticipated Defenses."

We have not dealt with or presented the so-called "anticipated defenses" referred to in Petitioners' brief of public policy or consequences flowing from adherence to the Charter of the United Nations. The Fourteenth Amendment governs this situation so clearly and completely that other arguments are surplusage. The thorough consideration given all aspects of this problem in the *Shelley* case is so recent that we have not felt it necessary to review sociological and statistical data presented there as to the gravity and importance of this issue.

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[18]California Civil Code, Sec. 1213; *Wayt v. Patee*, 205 Cal. 46. Recitals of this kind are surplusage.

Conclusion.

The constitutional considerations that compelled the result reached in the *Shelley* case, and related cases, require affirmance of the judgment below.

Respectfully submitted,

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